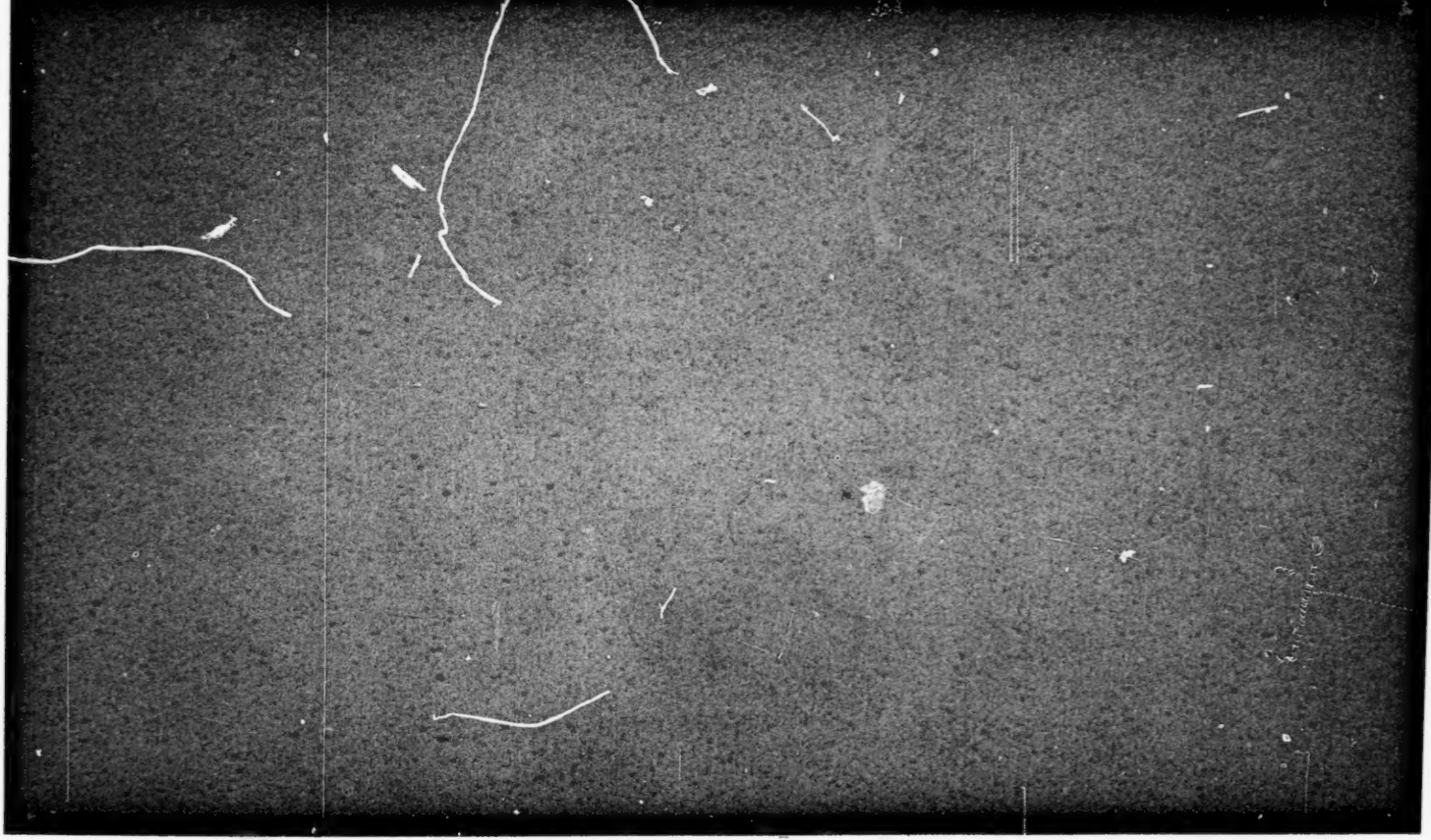

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-94

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.,

Petitioners,

—vs—

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., and UNITED CEMENT COMPANY,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, LITTON INDUSTRIES LEASING CORPORATION and LITTON SYSTEMS, INC.

[redacted]

TABLE OF CONTENTS

Page

Table of Authorities i

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Argument 6

1. Jurisdiction 6

2. Standing and the "two sales" requirement . 11

   a. Standing 12

   b. "two sales" requirement 12

3. Sherman Act 14

Conclusion 15

Appendix 1 ..... 1a

Addendum to Appendix 1 ..... 3a

Certificate 5a

TABLE OF AUTHORITIES

Cases

Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir. 1968), cert. denied, 393 U.S. 831 (1968) 7, 9

Aetna Casualty & S. Co. v. Flowers, 330 U.S. 464, 468 (1946) 11

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 12

Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972), cert. denied, 408 U.S. 928 (1972) 7, 9

TABLE OF AUTHORITIES (Continued)

Page

Borden Co. v. F.T.C., 339 F.2d 953 (7th Cir. 1964), rev'd. on other grounds, 383 U.S. 637 (1966) 9

Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp., 283 F.Supp. 202 (C.D. Cal. 1968) 10

Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp., 370 F.2d 332 (6th Cir. 1967), cert. denied, 387 U.S. 930 (1967) 7, 9

Central Ice Cream Co. v. Goldenrod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961), cert. denied, 368 U.S. 829 (1961) 10

Country Maid, Inc. v. Haseotes, 324 F.Supp. 875 (E.D. Pa. 1971) 10

Copp Paving Company, Inc. v. Gulf Oil Company, 487 F.2d 202 (9th Cir. 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974) 10

Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949) 12

Dandridge v. Williams, 397 U.S. 471 (1970) 11

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 14

Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967) 9

Foremost Dairies, Inc. v. F.T.C., 348 F.2d 674 (5th Cir. 1965), cert. denied, 382 U.S. 959 (1965) .. 9

TABLE OF AUTHORITIES (Continued)

Page

Flotken's West, Inc. v. National Food Stores, Inc., 312 F.Supp. 136 (E.D. Mo. 1970) 10

A. J. Goodman & Sons v. United Lacquer Mfg. Corp., 81 F.Supp. 890 (D.C. Mass. 1949) 12

Izumi v. Shell Oil Co., 1973 Trade Cases, Par. 74,000, 274 (N.D. Cal. 1972) 10

Ingram v. Phillips Petroleum Co., 259 F.Supp. 176 (D.N.M. 1966) 10

Jones v. Metzger Dairies, Inc., 334 F.2d 919 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965) 10

Kapiolani Motors, Ltd. v. General Motors Corp., 337 F.Supp. 102 (D.C. Hawaii 1972) 13

Kroger v. Federal Trade Commission, 438 F.2d 1372 (6th Cir. 1971), cert. denied, 404 U.S. 871 (1971) 13

Langnes v. Green, 282 U.S. 531 (1930) 11

Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973), cert. denied, 414 U.S. 1116 (1973) 7, 9

Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972), cert. denied, 409 U.S. 1077 (1972) 9

Liquilux Gas Services, Inc. v. Tropical Gas Co., 303 F.Supp. 414 (D.P.R. 1969) 10

Mayer Paving and Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974) 7, 9

TABLE OF AUTHORITIES (Continued)

Page

Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953) 15

Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416 (5th Cir. 1972) 14

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) 15

Stough v. May & Co. of Georgia, 484 F.2d 22 (5th Cir. 1973) 13

United States v. Ballard, 322 U.S. 78 (1943) 11

United States v. American Railway Express Co., 265 U.S. 425 (1924) 11

Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969), cert. denied, 396 U.S. 1042 (1970) 7, 9

Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969), cert. denied, 396 U.S. 901 (1969) 7, 9

Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934, rehearing denied, 375 U.S. 871 (1963) 10

Statutes

15 U.S.C. §1 3

15 U.S.C. §2 3

15 U.S.C. §12 8

TABLE OF AUTHORITIES (Continued)

Page

15 U.S.C. §13(a) 6, 7, 8, 10, 12

15 U.S.C. §13(f) 2, 3, 6, 8, 10, 12

15 U.S.C. §15 ..... 2, 5

28 U.S.C. §1291 2

28 U.S.C. §1292(b) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-94

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.,
Petitioners,

versus

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., and UNITED CEMENT COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, LITTON INDUSTRIES LEASING CORPORATION, and LITTON SYSTEMS, INC.

OPINIONS BELOW

The citation to the opinion of the United States Court of Appeals for the Fifth Circuit is adequately set forth in the Petition (Pet. 2). The unreported opinion of the District Court is attached to the Petition as Appendix A, pp. 1a through 75a, but does not include clerical corrections made pursuant to an Order dated April 11, 1973 which is attached hereto as Appendix 1. The

opinion of the Court of Appeals is attached to the Petition as Appendix B, pp. 76a through 85a, and notification of its Order denying rehearing en banc is attached to the Petition as Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2), except that jurisdiction of the Court of Appeals was based on 28 U.S.C. §1291 (appeal from final decision) rather than on 28 U.S.C. §1292(b) (certified interlocutory appeal) as asserted in the Petition.

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals, affirming the District Court's entry of summary judgment on all federal claims and dismissal of state antitrust and common law claims without prejudice, holding that an interstate sale must be involved for jurisdiction to attach under Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act,[1] warrants review.

2. Whether this Court should review issues on which the District Court ruled in favor of Respondents and on which the Court of Appeals pretermitted ruling involving (a) the petitioners' standing under Section 4 of the Clayton, Robinson-Patman Act,[2] and (b) the

---

[1] 15 U.S.C. Section 13(f), hereinafter sometimes referred to as "Section 2(f) of the Clayton, Robinson-Patman Act."

[2] 15 U.S.C. Section 15.

"two sales" requirement to establish discrimination within the ambit of Section 2(f) of the Clayton, Robinson-Patman Act.

3. Whether the decision of the Court of Appeals, affirming the District Court in determining that there was no combination or conspiracy requisite to establish the claims under the Sherman Antitrust Act,[3] warrants review.

STATEMENT OF THE CASE

This is a private antitrust action involving "five counts" of alleged violations of the Sherman Act and "five counts", four of which apply to the respondents herein, of alleged violations of the Clayton, Robinson-Patman Act. All claims represent different theories of recovery relating to one event: petitioners' unsuccessful bid, as joint venturers, to furnish ready-mix concrete for use in construction of a shipyard (the Litton Advanced Marine Production Facility) in Pascagoula, Mississippi.[4]

Respondent, Litton Systems, Inc. ("Litton Systems") is the successor in interest to Ingalls Shipbuild-

---

[3] 15 U.S.C. Sections 1 and 2, hereinafter sometimes referred to as "Sections 1 and 2 of the Sherman Act."

[4] The factual background of this litigation is exhaustively detailed in the District Court's Memorandum Opinion (Pet. App. A at 3a-10a). The allegations against all defendants and against the respondents herein are delineated in the District Court's Memorandum Opinion (Pet. App. A at 10a-12a, 55a-57a).

ing Corporation ("Ingalls"),[5] which contracted in 1967 to construct a shipyard for the State of Mississippi and to lease the facility from the State upon its completion. Thereafter, in March, 1968, Litton Systems, through its general contractor, Ralph M. Parsons Company, Inc. ("Parsons"),[6] solicited bids for substantial quantities of ready-mix concrete expressly reserving the right to reject any and all bids and furnish the winner cement, sand and aggregate at its discretion (Pet. App. B at 77a). Additionally, all prospective bidders were advised that the winner would be required to furnish a plant located in close proximity to the construction site (Pet. App. B at 81a, n. 10).

The petitioners bring this action against Litton Systems as the potential customer to whom they submitted bids and United Cement Company ("United"), a cement supplier from whom they received a price quotation for use in bidding. No true competitor of the petitioners, including the winning bidder, is joined as defendant. In essence, the petitioners allege, with re-

---

[5]The Petition erroneously refers to Ingalls as a subsidiary of Litton Systems (Pet. 6, 15-16). It is established by deposition that in 1967, Ingalls and Litton Systems were subsidiaries of Litton Industries, Inc. and that thereafter Ingalls merged into Litton Systems in 1968. Ingalls never was a subsidiary of Litton Systems. At the present time the shipyard is operated by Litton Systems through its unincorporated Ingalls Shipbuilding division. Its parent corporation, Litton Industries, Inc. is not a party to this action. Similarly confusing, is the joinder of Litton Industries Leasing Corporation, which, as noted by the Court of Appeals, is conceded to have been erroneously sued (Pet. App. B at 79a).

[6]Parsons was joined as a defendant in this action and, after it obtained summary judgment, was dismissed on motion by petitioners while their appeal was pending in the Court of Appeals.

spect to Litton Systems, that it unlawfully refused or failed to contract with them and that violations of antitrust laws may be inferred from the facts and circumstances pleaded concerning the procedure used in bidding, including negotiation with "the two low bidders", the requirement of several rebids, the introduction of United to each competitive bidder prior to the receipt of final bids and award of the contract and the allegedly false information furnished to the plaintiffs' competitor concerning the plaintiffs' bid price. The events at issue took place after the original submission of bids on April 22, 1968 and concluded with the contract award to plaintiffs' competitor on May 10, 1968.

All respondents filed motions for summary judgment upon the conclusion of discovery characterized as "extensive and exhaustive" (Pet. App. B at 79a, Pet. App. A at 74a). Upon a review of the complete record, the District Court granted respondents' motions for summary judgment on each federal antitrust claim holding that the "in commerce" jurisdictional requirements have not been met and that the record reflects that no combination of any nature or conspiracy existed or could be proved in support of Sherman Act claims. Regarding claims under the Clayton, Robinson-Patman Act, the District Court held that the petitioners were not injured in their business or property as required by 15 U.S.C. Section 15, and neither stated nor could sustain their claims in the absence of "two actual sales" or of a competitive advantage. Additionally, the District Court declined to exercise pendent jurisdiction over state and common law claims.

On appeal, the Court of Appeals unanimously affirmed, holding, with respect to the Clayton, Robinson-Patman Act claims, that interstate sales must be involved for jurisdiction to attach, pretermitting further discussion. With respect to the Sherman Act claims, the court below held that while there is "arguable jurisdiction," proofs of conspiracy, relevant market, its condition or of a monopoly or dangerous probability of one, are entirely lacking. Additionally, it approved the dismissal of state and common law claims without prejudice. Thereafter, a petition for rehearing en banc was denied.

ARGUMENT

1. The Court of Appeals' decision that no jurisdiction existed with respect to the Clayton, Robinson-Patman Act claims was correct and presents no important federal question or conflict of decisions.

Petitioners concede that there was but one sale for use in the case sub judice (Pet. 13) and that the only sale of concrete, which was made by their competitors, was entirely intrastate, though ingredients which had travelled interstate, such as cement, were involved (Pet. App. B at 81a). Consistent with the express statutory language of Section 2(f) and its corollary, Section 2(a) applicable to sellers, this Court has uniformly denied certiorari in every case which has held that a sale across a state line is a prerequisite for federal

jurisdiction under the Clayton, Robinson-Patman Act including petitions filed in six of the past seven years.[7]

As recently as January, 1974, in *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974), this Court denied certiorari from an opinion wherein the majority stated that the "in commerce" jurisdictional language of Section 2(a) requires that one of the sales complained of as constituting price discrimination must cross a state line. 486 F.2d at 766.[8] Similarly, this Court denied certiorari in *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), cert. denied, 414 U.S. 1116 (1973), where the Fifth Circuit held that "at least one of the sales alleged to be discriminatory must actually be *in* interstate commerce." 483 F.2d at 1144.

In 1972, this Court denied certiorari in *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), cert. denied, 408 U.S. 928 (1972). That case, involving the dismissal

---

[7]*Littlejohn v. Shell Oil Co.*, 483 F. 2d 1140 (5th Cir. 1973) cert. denied, 414 U.S. 1116 (1973); *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir., 1972), cert. denied, 408 U.S. 928 (1972); *Walker Oil Co. v. Hudson Oil Co.*, 414 F. 2d 588 (5th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F. 2d 4 (5th Cir. 1969), cert. denied, 396 U.S. 901 (1969); *Abramson v. Colonial Oil Co.*, 390 F.2d 873 (5th Cir. 1968) cert. denied, 393 U.S. 831 (1968); *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp.*, 370 F. 2d 332 (6th Cir. 1967), cert. denied, 387 U. S. 930 (1967).

[8]In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, supra, there was an allegation of interstate sales by the defendant from Illinois into Indiana at prices lower than the intrastate sales in Illinois. Id.

of a Robinson-Patman price discrimination claim arising from allegedly discriminatory intrastate gasoline sales confined to the Salt Lake City, Utah area, held that interstate movement of ingredients does not satisfy the "in commerce" provision of the Act.

Section 2(f) of the Clayton, Robinson-Patman Act, in conjunction with Section 2(a), contains three requirements as to "commerce"[9] which place precise limitations upon subject matter jurisdiction. Section 2(f) reads:

> "It shall be unlawful for any person (1) engaged in commerce, (2) in the course of such commerce, (3) knowingly to induce or receive a discrimination in price which is prohibited by this Section."

Section 2(a) reads, in pertinent part:

> "It shall be unlawful for any person (1) engaged in commerce, (2) in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, (3) where either or any of the purchases involved in such discrimination are in commerce . . ."

---

[9] "Commerce" is defined as interstate and foreign commerce. See Section 1 of the Clayton Act (15 U.S.C. Section 12).

To establish price discrimination in violation of this Act, it must be proved that the alleged discriminatory sales were made in interstate commerce. See *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 236-237, (1951). The Court of Appeals held: "that interstate sales must be involved for jurisdiction to attach under these (Clayton, Robinson-Patman) acts." (Pet. App. B at 81a-82a). In so holding, the court below adhered to the literal language of the statute refusing to subvert the clear meaning of the words of the statute and excise the expressed mandate of a sale "in commerce." As was correctly noted, its holding is supported by "well-nigh universal precedent." (Pet. App. B at 81a) *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973) cert. denied, 414 U.S. 1116 (1973); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), cert. denied, 409 U.S. 1077 (1972); *Belliston v. Texaco, Inc.* 455 F.2d 175 (10th Cir. 1972), cert. denied, 408 U.S. 928 (1972); *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969), cert. denied, 396 U.S. 901 (1969); *Abramson v. Colonial Oil Co.*, 390 F.2d 873 (5th Cir. 1968), cert. denied, 393 U.S. 831 (1968); *Food Basket, Inc. v. Albertson's, Inc.*, 383 F.2d 785 (10th Cir. 1967); *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp.*, 370 F.2d 332 (6th Cir. 1967), cert. denied, 387 U.S 930 (1967); *Foremost Dairies, Inc. v. Federal Trade Commission*, 348 F.2d 674 (5th Cir. 1965) cert. denied, 382 U.S. 959 (1965); *Borden Co. v. Federal Trade Com-*

mission, 339 F.2d 953 (7th Cir. 1964), rev'd. on other grounds, 383 U.S. 637 (1966); *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965); *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934, rehearing denied, 375 U.S. 871 (1963); *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 287 F.2d 265 (7th Cir. 1961), cert. denied, 368 U.S. 829 (1961); *Izumi v. Shell Oil Co.*, 1973 Trade Cases, Par. 74,000, 274 (N.D. Cal. 1972); *Country Maid, Inc. v. Haseotes*, 324 F.Supp. 875 (E.D. Pa. 1971); *Flotken's West, Inc. v. National Food Stores, Inc.*, 312 F.Supp. 136 (E.D. Mo. 1970); *Liquilux Gas Services, Inc. v. Tropical Gas Co.*, 303 F.Supp. 414 (D.P.R. 1969); *Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp.*, 283 F.Supp. 202 (C.D. Cal. 1968); and *Ingram v. Phillips Petroleum Co.*, 259 F.Supp. 176 (D. N.M. 1966).

The decision in *Copp Paving Company, Inc. v. Gulf Oil Company*, 487 F.2d 202 (9th Cir. 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974), does not represent direct conflict with the opinion below or with other decisional law on the "in commerce" jurisdictional requirements of Section 2(f) - 2(a) because it is unique to the facts of that case. The Ninth Circuit acknowledged the "state line test" in actions pursuant to Section 2(a) but felt an exception should be made where the particular commodity involved (asphalt) was used in creating an instrumentality of interstate commerce (interstate highway construction). The *Copp Paving* case arises in a clearly distinguishable context from this action. In *Copp Paving*, the de-

fendant-petitioners are producers, and competitors of processors, of asphaltic oil engaged in continuous direct competition involving multiple consummated sales of asphaltic concrete and claims therein involve use of asphaltic concrete in interstate highway construction. In contrast, Litton Systems was not engaged in competition with anyone but was making a single one-time purchase of ready-mix concrete through competitive bids for its own use in the construction of a shipyard.

2. Questions raised in the Petition involving standing and the "two sales" requirement under the Clayton, Robinson-Patman Act, upon which the Court of Appeals pretermitted ruling, are equally controlling and present no important federal question or conflict of decisions.

This Court has often declined to consider the merits of questions raised by a petitioner where the court below has expressed no views on such questions, *Aetna Casualty & S. Co. v. Flowers*, 330 U.S. 464, 468 (1946); *United States v. Ballard*, 322 U.S. 78, 88 (1943), but it is clear that the prevailing party in the court below may assert in this Court any ground in support of its judgment, whether or not that ground was relied upon or even considered below. *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Langnes v. Green*, 282 U.S. 531, 538 (1930); *United States v. American Railway Express Co.*, 265 U.S. 425, 435-436 (1924).

a. *Petitioners lack standing under Section 4 of the Clayton, Robinson-Patman Act.*

This action arises out of a competitive bidding situation, in which Litton Systems reserved the right to reject any or all bids and the courts below concluded that it had the right to do so under Mississippi law (Pet. App. B at 83a, Pet. App. A at 48a, 50a, 71a). Under the circumstances, petitioners were no more than offerors (Pet. App. A at 68a), see *A. J. Goodman & Sons v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D.C. Mass. 1949), and no right or interest accrued to them by the time of their final bid or by virtue of their prior bids. Section 2(f) - 2(a) does not extend to mere offers. *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949). This Court has stated that in enacting the antitrust statutes, "... congressional concern (was) with the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Accordingly, these respondents urge that petitioners do not qualify as persons injured in their business or property as required by Section 4 of the Clayton, Robinson-Patman Act. (See Pet. App. A at 33a-34a, 59a.)

b. *Petitioners failed to state a claim, nor could they state a claim, absent two sales and competitive advantage.*

The petitioners concede that there was only one sale of concrete but assert that a single sale is sufficient to maintain an action under Section 2(f), relying on

Kroger v. Federal Trade Commission, 438 F. 2d 1372 (6th Cir. 1971), cert. denied, 404 U.S. 871 (1971).

The *Kroger* case was extensively analyzed by the District Court (Pet. App. A at 66a-68a) which observed that the decision illustrates the requirement of two sales and competitive advantage in order to state a price discrimination claim, and concluded:

> "This Court agrees with the argument of Litton that the facts in *Kroger* are distinguishable from those in the case sub judice for the following reasons: (1) there was but one sale for use in the case sub judice, as contrasted from two or more sales for resale in *Kroger;* (2) there is no evidence in this action that H & W's bid was not cost justified as was the case with Beatrice's bid given Kroger; actually, the evidence is to the contrary since H & W had a lower cement price than did the plaintiffs herein; (3) in *Kroger*, Beatrice was in violation of § 2(a) except for a § 2(b) defense to the Beatrice sales at higher prices to retail grocery chains competing with Kroger. In the case sub judice there was one sale and thus there was no discrimination in price prohibited by 15 U.S.C.A. § 13." (Pet. App. A at 67a)[10]

As stated in *Stough v. May & Co. of Georgia*, 484 F.2d 22, 23 (5th Cir. 1973):

---

[10]The *Kroger* case is discussed in *Kapiolani Motors, Ltd. v. General Motors Corp.*, 337 F. Supp. 102 (D.C. Hawaii 1972).

"In order that there be a discrimination between purchasers there must be actual sales at two different prices to two different actual buyers."

3. The decision of the Court of Appeals, affirming the District Court, determining that there was no combination or conspiracy to support Sherman Act claims, does not warrant review.

The Court of Appeals, based on a record characterized as "extensive and exhaustive" (Pet. App. B at 79a) observed: "We have searched the record in vain for evidence supporting plaintiffs' allegations of a combination or conspiracy against them between Litton and anyone in the area of plaintiffs' claims" (Pet. App. B at 82a) and held that "nothing which by any method short of Procrustes' can be made to demonstrate a *conspiracy* to injure plaintiffs" (Pet. App. B at 84a).[11] Accordingly, summary judgment for respondents on all Sherman Act claims was affirmed. The ruling was correct as factually consistent with this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

---

[11]The Court of Appeals concluded that petitioners had shown "arguable jurisdiction" under the Sherman Act (Pet. App. B at 80a); the trial court had held that a single contract involving production of ready-mix concrete for delivery to the construction site, all in Pascagoula, Miss., was a purely local activity having "no significant effect on the flow of any material in interstate commerce and thus did not meet either the qualitative or quantitative test constituting violation of the Sherman Act." (Pet. App. A at 72a-73a.) See *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F. 2d 416 (5th Cir. 1972).

The Petition erroneously alludes to a Litton-Ingalls conspiracy (Pet. 15-16). Ingalls, as an unincorporated division, is an indivisible part of Litton Systems and it is axiomatic that Litton Systems cannot conspire with itself. A corporation cannot conspire with its officers, employees or agents. *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953). Similarly, unincorporated divisions of a single corporation cannot conspire to violate antitrust laws. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 82-83 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970).

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance to the general public or where a Court of Appeals has rendered a decision in conflict with a decision of another Court of Appeals on the same matter. Respondents herein respectfully submit that the instant Petition presents no important question of federal law and no conflict of decisions calling for resolution by this Court.

Dated: Beverly Hills, Calif.
September ____, 1974

Respectfully submitted,

CHARLES E. FOSTER
EDWARD E. VAILL
360 North Crescent Drive
Beverly Hills, Calif. 90210

KARL WIESENBURG
P.O. Box 26
Pascagoula, Miss. 39561

CHARLES E. FOSTER

Attorneys for Respondents,
Litton Industries Leasing
Corporation and Litton
Systems, Inc.

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.,

Plaintiffs,

versus C.A. No. 4166(N)

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., RALPH M. PARSONS COMPANY, INC. AND UNITED CEMENT COMPANY, INC.,

Defendants.

ORDER

Pursuant to Rule 60(a), F.R.C.P., the following clerical corrections shall be made in the Memorandum Opinion filed herein on February 16, 1973:

On page 4, line 3 from the bottom of the text, the word "requisites" should read "request".

On page 7, line 5 from the bottom of the text, the phrase "$3.47 net" should read "$3.37 net".

On page 10, beginning on line 10 from the bottom of the text, the phrase ". . . that Litton and United agreed that United would 'consider' permitting Rust Engineering, a subsidiary of Litton, to have a 'fair

shot' or 'final opportunity' to quote cement prices to plaintiffs and H & W, which constituted an agreement in restraint of interstate trade;" should read "that Litton and United agreed that United would be awarded the cement contract if it would 'consider' permitting Rust Engineering, a subsidiary of Litton, to be used in building United's proposed cement plant in Northern Mississippi, and by allowing United to have a 'fair shot' or 'final opportunity' to quote cement prices to plaintiffs and H & W, which constituted an agreement in restraint of interstate trade;"

On page 10, line 3 from the bottom of the text, the word "and" should read "than".

On page 11, line 7 from the top of the text, the word "higher" should read "lower" and in Footnote 6, line 4 from the bottom, the word "lesson" should read "lessen".

On page 16, line 12 from the top of the text, the phrase "Mr. Parsons" should read "Mr. Calhoun".

On page 23, Footnote 17, the third line from the top of the footnote, the word "Litton" should read "Rust".

On page 26, line 1 of Footnote 20, the name "H & W's" should read "plaintiffs' ".

On page 55, line 16 from the top of the text, the word "never" should read "ever".

On page 57, line 9 from the top of the text, the word "paying" should read "pegging".

The Clerk of Court is directed to make the above changes in the Memorandum Opinion filed herein, denoting in the margin thereof the date of this Order.

ORDERED this 11th day of April, 1973.

/s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

Biloxi, Mississippi

Addendum To Appendix 1

(Clerical Corrections Pursuant to the Order of April 11, 1973, referenced to Appendix A to the Petition)

Page 5a, first full paragraph, line 7 — "requisites" should read "request";

Page 8a, first full paragraph, line 6 — "$3.47" should read "$3.37";

Page 11a,

1. Lines 21-26, which read "... that Litton and United agreed that United would 'consider' permitting Rust Engineering, a subsidiary of Litton, to have a 'fair shot' or 'final opportunity' to quote cement prices to plaintiffs and H & W, which constituted an agreement

in restraint of interstate trade;" should read "that Litton and United agreed that United would be awarded the cement contract if it would 'consider' permitting Rust Engineering, a subsidiary of Litton, to be used in building United's proposed cement plant in Northern Mississippi, and by allowing United to have a 'fair shot' or 'final opportunity' to quote cement prices to plaintiffs and H & W, which constituted an agreement in restraint of interstate trade;"

2. Line 30, "and" should read "than";

Page 12a, first full paragraph, line 2 — "higher" should read "lower";

Page 18a, line 12 from top of page — "Parsons" should read "Calhoun";

Page 27a, footnote 17, line 3 — "Litton" should read "Rust";

Page 31a, footnote 20, line 1 — "H & W's" should read "plaintiff's";

Page 68a, first full paragraph, line 9, which reads "that Litton was never guilty of any conduct which viol-" should read "that Litton was ever guilty of any conduct which viol-"; and

Page 70a, first full paragraph, line 20 — "paying" should read "pegging".

CERTIFICATE OF SERVICE

I, Charles E. Foster, one of the attorneys for the Respondents, Litton Industries Leasing Corporation and Litton Systems, Inc., in this Brief in Opposition, do hereby certify that I have this day mailed a true and correct copy of the foregoing Brief in Opposition For Respondents, Litton Industries Leasing Corporation and Litton Systems, Inc., to Norman Breland, Esq., counsel for the Petitioners, at his usual post office address, the same being Post Office Box 396, Gulfport, Mississippi 39501; and to W. Timothy Jones, Esq., counsel for the Respondent, United Cement Company, at his usual post office address, the same being Post Office Drawer 119, Jackson, Mississippi 39205, via United States Mail, postage prepaid.

This, the ____ day of September, 1974.

_____

CHARLES E. FOSTER